multiplicity of suits. It seems, therefore, that recovery in full is a necessary consequence of the right to recover in advance, only where the courts feel that any other result would produce interminable litigation.

But in fact the practical difficulty of innumerable suits which turned the courts aside from the fundamental canon for the construction of an insurance contract, was nothing but a figment of the judicial imagination. The total sum of the judgments in this infinite series of suits may be calculated in advance with the aid of a comparatively simple formula.[13] This amount could be collected in a single action against the re-insurer, which could be brought prior to any payment to the insured. It furnishes an exact equitable measure of the re-insurer's liability, and affords the re-insured every protection which is consistent with the nature of a contract for indemnity against loss.[14] There is therefore no reason why the courts should, by construction, incorporate into the insurance policy a provision that the re-insurer shall be liable to the insolvent re-insured for the full amount of the insolvent's liability.

It is further submitted that if a clause in the policy expressly bound the courts to this construction, it should render the policy void in its inception. The provision would be a direct incentive to the creditors of an insolvent insurance company to destroy all its risks which had been re-insured in a solvent company. Such a contract tempting a man to transgress the law is void.[15]

STATE CONTROL OF FOREIGN CORPORATIONS VERSUS THE JURISDICTION OF THE FEDERAL COURTS. — "The judicial power shall extend . . . to controversies . . . between citizens of different states." [1] Within this clause a corporation is treated substantially as a citizen of the state of its incorporation.[2] But it has long been held that a foreign corporation cannot claim the "privileges and immunities of citizens" within Art. IV., § 2 of the Constitution, and that states other than that of incorporation can totally exclude it or impose such conditions as they choose upon the privilege of doing business within their borders.[3]

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[13] Let a = total liabilities of insolvent insurer; b = his liability to the insured whose risk has been re-insured; c = assets of the insurer, exclusive of his claim upon the re-insurer. The sum will be represented by the formula $S = \frac{bc}{a - b}$. The mathematics of this may be found worked out in 15 HARV. L. REV. 866.

[14] The above formula, when applied, will be found to require the re-insured to pay in full whenever such payment will enable the re-insured to meet all his obligations. This is probably the state of the facts in the following cases: *In re* Republic Ins. Co., *supra;* Allemania Ins. Co. *v.* Firemen's Ins. Co., *supra.* The re-insured therefore will be kept from insolvency arising from the re-insured loss. But if notwithstanding payment in full by the re-insurer the re-insured would remain insolvent, the formula requires the re-insured to pay only the amount which the original insured can recover. The re-insurance would thus leave the estate of the re-insured as well off as if the original risk had never been contracted.

[15] See Hunt *v.* N. H. Fire U. Ass'n, 68 N. H. 305, 309, 38 Atl. 145, 147.

[1] CONSTITUTION, Art. III, § 2.

[2] See St. Louis & San Francisco Ry. Co. *v.* James, 161 U. S. 545.

[3] Paul *v.* Virginia, 8 Wall. (U. S.) 168. See Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519, 586.

To what extent may a state in the ostensible exercise of these wide powers indirectly impair the jurisdiction of the federal courts as defined in the Constitution and laws of the United States by exerting pressure on foreign corporations to restrain them from invoking that jurisdiction?

Two questions are well settled by the authorities. First, acquisition of permanent and tangible property within another state, with express,[4] and perhaps with implied,[5] license, causes a foreign corporation to become "a person within the jurisdiction," entitled to the "equal protection of the laws" guaranteed by the Fourteenth Amendment. Consequently, a subsequent state statute providing for its expulsion for resorting to the federal courts, without likewise providing for terminating the privileges of domestic corporations, is unconstitutional, independently of its interference with the federal courts.[6] Such might well be the basis of a recent decision which reaches a like result on other grounds. *Western Union Telegraph Co.* v. *Frear*, 216 Fed. 199 (Dist. Ct., W. D. Wis.).[7] Second, it is clear that no state statute, nor any agreement made pursuant thereto, can in any way enlarge [8] or impair [9] the jurisdiction of the United States courts, if suit is nevertheless brought therein. But it has been held, where a foreign corporation has acquired no permanent tangible property within a state, though having done business therein, that a subsequently passed statute providing for its expulsion upon a resort to the United States courts is not unconstitutional,[10] the reason given being that the corporation having no right to remain, may not cavil at the reason of its dismissal. With these decisions it is difficult to reconcile another, holding that if an agreement not to resort to the federal courts be exacted as a condition precedent to the granting of a license to do business within the state, the illegality of such a condition precedent renders unconstitutional the imposition of a penalty for doing busi-

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[4] Southern Ry. Co. *v.* Greene, 216 U. S. 400.

[5] See concurring opinion of White, J., in Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 48.

[6] Herndon *v.* Chicago, R. I. & P. Ry. Co., 218 U. S. 135; Roach *v.* Atchison, T. & S. F. Ry. Co., 218 U. S. 159. A license to do business issued to a foreign corporation may sometimes also amount to a contract not to discriminate against it, which the state cannot constitutionally impair by later legislation. American Smelting & Refining Co. *v.* Colorado, 204 U. S. 103. *Quære*, if it would not be discriminatory to penalize the exercise of the right to invoke federal jurisdiction only in those cases where it arises by virtue of the foreign citizenship of the corporation, in which cases the act would not be capable of application to domestic corporations?

[7] See note 11, *infra*. For a statement of this and the other principal case, see RECENT CASES, p. 320.

[8] See Southern Pacific R. Co. *v.* Denton, 146 U. S. 202.

[9] See Union Bank of Tennessee *v.* Jolly's Adm'rs, 18 How. (U. S.) 503; Suydam *v.* Broadnax, 14 Pet. (U. S.) 67; Insurance Co. *v.* Morse, 20 Wall. (U. S.) 445; David Lupton's Sons *v.* Automobile Club of America, 225 U. S. 489.

[10] Doyle *v.* Continental Ins. Co., 94 U. S. 535; Security Mutual Life Ins. Co. *v.* Prewitt, 202 U. S. 246. Though the distinction was not taken in these cases, it has later been said that ownership of tangible property and not merely the ownership of business good will is required to make a foreign corporation "a person within the jurisdiction." See Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 88. A possible reason for this somewhat unsatisfactory distinction is that good will depends for its value solely upon the privilege of doing business within the state, a privilege in itself within the absolute control of the sovereign. See National Council *v.* State Council, 203 U. S. 151, 163.

ness without the license.[11] This case is not only not overruled[12] by the cases last cited, but has recently been cited with approval.[13] The net result seems to be that it is constitutional to use an absolute power of exclusion or expulsion to punish a failure to refrain from federal rights, but unconstitutional to bring the same pressure to bear to induce the making of an agreement whose vice is its tendency toward the same result.

If, then, it be unconstitutional to require agreement to a condition not to resort to the federal courts, it must be because the condition is of itself unconstitutional. Accordingly, it would seem that the presence of such a condition in a license issued to a corporation upon its entrance into a state could not prevent it, upon the acquisition of property, from becoming "a person within the jurisdiction" under the protection of the Fourteenth Amendment, nor thereafter operate as an infirmity existing in the license *ab initio* to take it out from such protection. However, a recent case, wherein a corporation had acquired property under a license terminable upon a resort to the United States courts, holds that upon later breach of the condition the corporation ceased to be a person within the jurisdiction, and so allows this discriminatory expulsion. *State* ex rel. *Kimberlite Mining & Washing Co.* v. *Hodges*, 169 S. W. 942 (Ark.). Even if the Fourteenth Amendment had not been violated, the result seems doubtful in the present state of the authorities. The cases permitting the expulsion of foreign corporations for seeking the federal courts[14] have recently been cited only to be distinguished,[15] and it has since been held that a state cannot, by the threatened exercise of an absolute power of prohibiting the carrying on of intrastate business indirectly extort contributions measured by the interstate business of a company engaged in both.[16] More recent language of the court recognizing the inviolability of the constitutional right to invoke federal jurisdiction in proper cases,[17] and in another place, hinting at the unconstitutionality of imposing upon the entrance of foreign corporations conditions violating constitutional rights,[18] makes one wonder whether indirect state attack upon the right to resort to federal courts will any longer be permitted.[19]

[11] Barron *v.* Burnside, 121 U. S. 186. The principal federal case based its result on this decision although the corporation had not expressly agreed in advance not to sue in the federal courts.

[12] See Security Mutual Life Ins. Co. *v.* Prewitt, *supra*, 253.

[13] See Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 36.

[14] See note 10, *supra*.

[15] See Harrison *v.* St. Louis & San Francisco R. Co., 232 U. S. 318, 333; Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 45.

[16] Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1; Pullman Co. *v.* Kansas, 216 U. S. 56; Ludwig *v.* Western Union Telegraph Co., 216 U. S. 146. These cases are perhaps explainable on the ground that the inseparability of the interstate and intrastate business made the prohibition of the latter a burden upon the former. See Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 85, 86.

[17] ". . . The states are in the nature of things without authority to penalize or punish one who has sought to avail himself of the federal right of removal on the ground that the removal asked was unauthorized or illegal." White, C. J., in Harrison *v.* St. Louis & San Francisco R. Co., *supra*, at 329.

[18] "For example, a state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law. . . ." Day, J., in Baltic Mining Co. *v.* Massachusetts, *supra*, 83.

[19] For a general discussion of similar conflicts between state and federal powers, see an article entitled "Nullification by Indirection," 23 HARV. L. REV. 441.

RIGHT OF MASTER, LIABLE UNDER EMPLOYERS' LIABILITY ACT, TO REIMBURSEMENT FROM ONE WHO INJURES SERVANT. — Though recovery has almost invariably been granted to anyone who has been intentionally injured by being deprived of a contractual or similar right, through action upon a third party,[1] nevertheless, except in the historically anomalous suits for loss of services,[2] if such injury to the plaintiff was negligent and unintentional, though occasioned even by an intentional injury to a third person, recovery has generally been denied.[3] Accordingly when an employer is compelled, under an employers' liability act, to compensate his employee for an injury caused by the negligence of a third person, it is no surprise that a recent New Jersey case denies the right of the employer to recover from the tortfeasor. *Interstate Telephone and Telegraph Co.* v. *Public Service Electric Co.*, 90 Atl. 1062.[4] But, with all question of the policy of the employers' liability act aside, there seems to be no reason why recovery should be denied. In civil actions, since no question of punishment or correction is involved, no general distinction should be made between intentional injuries and injuries caused by acting without "due care" when damage to the plaintiff is a foreseeable result.[5] If the duty and the causation are clear, it is not a valid reason for denying recovery that the damage would not have occurred but for the existence of some obligation or some chance of profit.

Often, however, where the plaintiff thus suffers loss from injury to a third party, the injury to the plaintiff is not separate. Thus where the plaintiff has insured the injured party, if it is a true contract of indemnity, the operation of the contract is merely to shift the burden of the primary injury to the plaintiff's shoulders. In such cases, as, for example, marine and fire insurance, the plaintiff's redress should therefore be by subrogation,[6] since to allow an independent recovery would make the defendant liable in two actions for a single harm.[7] But in con-

[1] Lumley *v.* Gye, 2 L. & B. 216; South Wales Miners' Federation *v.* Glamorgan Coal Co., [1905] A. C. 239; Walker *v.* Cronin, 107 Mass. 555; Hughes *v.* McDonough, 43 N. J. 459; McNary *v.* Chamberlain, 34 Conn. 384.

[2] Husband suing for injury to wife: Brockbank *v.* Whitehaven Junction Ry. Co., 7 H. & N. 834; Mewhirter *v.* Hatten, 42 Ia. 288. Father suing for injury to child: Dennis *v.* Clark, 2 Cush. (Mass.) 347; Dixon *v.* Bell, 5 M. & S. 198. See Hall *v.* Hollander, 4 B. & C. 660. Master suing for injury to servant: Ames *v.* Union Ry. Co., 117 Mass. 541; Berringer *v.* Great Eastern Ry. Co., 4 C. P. D. 163. The fact that the wife cannot sue for an injury to her spouse, nor a child for an injury to its parent, demonstrates that these cases are not distinguishable on the ground that the injury to the plaintiff is by deprivation of a relational as distinguished from a contractual right. Feneff *v.* New York Central & H. R. R. Co., 203 Mass. 278, 89 N. E. 436.

[3] Anthony *v.* Slaid, 11 Metc. (Mass.) 290; Byrd *v.* English, 117 Ga. 191, 43 S. E. 419; Dale *v.* Grant, 34 N. J. L. 142; Davis *v.* Condit, 124 Minn. 365, 144 N. W. 1089; see 27 HARV L. REV. 689. But see Metallic Compression Casting Co. *v.* Fitchburg Ry. Co., 109 Mass. 277; Cue *v.* Breeland, 78 Miss. 864, 29 So. 850. The problem of liability when the plaintiff has been injured through being deprived of a chance of gain, is considered in the discussion of the case of Central Georgia Power Co. *v.* Stubbs, 80 S. E. 636 (Ga.), 27 HARV. L. REV. 689.

[4] A fuller statement of this case appears in RECENT CASES, p. 333.

[5] See POLLOCK, TORTS, 9 ed., p. 22.

[6] See Phœnix Ins. Co. *v.* Erie & Western Transportation Co., 117 U. S. 312; Home Mutual Ins. Co. *v.* Oregon Ry. & Nav. Co., 20 Ore. 569, 26 Pac. 857.

[7] That subrogation becomes valueless in cases when some rule of law bars the insured from recovering from the tortfeasor, does not demonstrate that the harm to the

tracts for the payment of a compensation, not of an indemnity, where, as in life and accident insurance, payment cannot be accurately adjusted to the loss, the injury to the plaintiff is clearly additional to that to the party directly harmed, and subrogation is properly denied.[8] Unfortunately, direct remedy for the plaintiff's separate injury has here been likewise refused.[9] In the case of employers' liability, the facts that the compensation is determined according to an arbitrary scale, and that only partial wages are paid during incapacity, strengthened by the analogy to life and accident insurance, clearly show that the compensation is in the nature of a bonus and not an indemnity.[10] So no remedy by subrogation can be given. But if the fact of the servant's employment is known, even under an optional form of employers' liability act, it is abundantly foreseeable that an injury to him might involve an injury to his master. This injury to the master is therefore the proximate result of negligent injury to the servant,[11] and a duty of care to the master likewise arises. Thus, although the principal case is in accord with the weight of authority in analogous cases, the principles of tort liability demand that direct recovery be granted.

But does the policy of employers' liability acts change this common law situation? The broad scope and the essentially remedial nature of these acts demand that the fundamental purpose of the legislation be made operative by a liberal construction.[12] It is generally

insurer is separate; it merely means that the harm which the insured has been able to shift to the insurer is an injury for which the law allows no recovery.

[8] Life insurance: Insurance Co. *v.* Brame, 95 U. S. 754. Accident insurance: Ætna Life Ins. Co. *v.* J. B. Parker & Co., 96 Tex. 287, 72 S. W. 168, 621.

[9] Conn. Mutual Life Ins. Co. *v.* New York, etc. Co., 25 Conn. 265.

[10] See RUEGG, EMPLOYERS' LIABILITY, 6 ed., 360. For the schedule of payment under the New Jersey act in force in the principal case, see N. J. P. L., 1911, p. 133.

[11] See Jeremiah Smith, "Legal Cause in Actions of Tort," 25 HARV. L. REV. 103, pp. 114–123.

[12] Many courts have enunciated a rule that statutes in derogation of the common law must be strictly construed. See State *v.* Cowper, 120 Tenn. 549, 533, 113 S. W. 1048, 1049; Dean *v.* Metropolitan E. R. Co., 119 N. Y. 540, 547. A *dictum* in an old case applies this rule to a special statute very similar to an employers' liability act. See Beeson *v.* Busenbark, 44 Kan. 619, 623, 25 Pac. 48, 49. The trend of present-day opinion, however, is increasingly against any such principle. See Professor Pound, "Common Law and Legislation," 21 HARV. L. REV. 283. Furthermore, it is a generally accepted doctrine that remedial statutes must be construed liberally and so as to make the intended remedy effective. See Becker *v.* Brown, 65 Neb. 264, 269, 91 N. W. 178, 180; Goss *v.* Cahill, 42 Barb. (N. Y.) 310, 315. Employers' liability acts, though imposing on the employer a new liability, are essentially remedial legislation. *Cf.* Va. & S. W. Ry. Co. *v.* Clower, 102 Va. 867, 871, 47 S. E. 1003, 1004. Again, the large application of these acts makes a strong reason why they should be broadly interpreted. See Jeremiah Smith, "Sequel to Workmen's Compensation Acts," 27 HARV. L. REV. 235, 250, 330. In determining the extent of "accidents arising out of and in the course of the employment," the courts have unfailingly construed the acts very liberally. Trim District School Board *v.* Kelley, [1914] A. C. 667, see especially the opinion of Lord Haldane on p. 680; Riley *v.* William Holland & Sons, [1911] 1 K. B. 1029; Moore *v.* Manchester Liners, [1910] A. C. 498; *In re* Hurle, 104 N. E. 336 (Mass.); Bryant *v.* Fissell, 84 N. J. L. 72, 86 Atl. 458. In two decisions, though maintaining the collateral common-law rights of the employees, it was expressly declared that a liberal construction in favor of the employees must be given these acts. See Ryalls *v.* Mechanics Mills, 150 Mass. 190, 193, 22 N. E. 766, 767; Colo. Milling, etc. Co. *v.* Mitchell, 26 Colo. 284, 287, 58 Pac. 28, 30. Indeed it has been argued that these acts have created a relational status between employer and employed. DICEY, LAW AND PUBLIC OPINION IN ENGLAND, 281–283.

conceded that this purpose is to cause the employer, who is able to transfer the burden to the consumer,[13] to give a prompt and certain pecuniary relief to the workman who has been injured in his employment.[14] Though to allow the employer to recover from one employee for the negligent injury to another for which the act has forced the employer to pay compensation, would undeniably be to place upon the employee the burden of an industrial injury, the acts do not contemplate giving the employee any other relief than compensation for industrial casualties. *A fortiori*, a negligent stranger is not given any protection by the act.[15] That many of the recent statutes have expressly given to the employer, to the extent of the compensation paid, a right of recovery over against the tortfeasor, yet, with but three exceptions, have not distinguished the negligent servant from the stranger, strengthens these conclusions.[16] However, it is more consistent economically to cause the industry as a part of the cost of production not only to supply relief to the incapacitated servant, but to assume the burden of all industrial injury of its employees. Hence, as legislation, statutes which forbid recovery by the employer against his negligent employee are preferable. Still the right of the master to recover on the principles of tort liability is not denied by the present statutes.[17]

TAXPAYER'S SUIT TO ENJOIN ELECTIONS ALLEGED NOT TO BE LEGALLY AUTHORIZED. — When a public official purporting to perform the duties of his office commits an illegal act, not only may the state call him to account by the exercise of the so-called prerogative writs,[1] but equity, at the suit of any person injured by the wrongful proceedings, will enjoin the violation of the plaintiff's rights.[2] The authorities are in confusion,

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[13] 2 TAUSSIG, PRINCIPLES OF ECONOMICS, 326.

[14] See Professor Wambaugh, "Workmen's Compensation Act," 25 HARV. L. REV. 129, 132.

[15] This problem is dealt with at length by Jeremiah Smith in his article on "Sequel to Workmen's Compensation Acts," *supra*.

[16] Recovery over to the extent of the compensation paid is granted the employer without qualification in the following statutes: CAL. L. 1913, ch. 176; CONN. L. 1913, ch. 138; ILL. BILL 841, 1913; IOWA L. 1913, ch. 147; KAN. L. 1911, ch. 218; NEB. L. 1913, ch. 198; NEV. L. 1913, ch. 198; N. J. L. 1913, ch. 95; R. I. L. 1912, ch. 831; WIS. L. 1911, ch. 50; 60 & 61 Vict., c. 37, § 6. In New York, the right of subrogation is limited to cases where the tortfeasor was not in the same employ. L. 1913, ch. 81; CONSOLIDATED LAWS, ch. 67. In Oregon and Washington the right of recovery over is limited to accidents away from the employer's plant. ORE. L. 1913, ch. 112; WASH. L. 1911, ch. 74.

[17] The opinion in the principal case describes the compensation paid the employee as past wages, and therefore not subject to recovery. This, it is submitted, overlooks the fact that the obligation is contingent, be the compensation in the nature of wages or otherwise, and therefore the liability thrust upon the employer is a damage which he would not otherwise have suffered.

[1] For a learned discussion of the relation of injunction to the legal prerogative writs, see State *v.* Lord, 28 Ore. 498, 510, 43 Pac. 471, 474. When the plaintiff has the alternative to apply for mandamus, he may be denied equitable relief. Larcom *v.* Olin, 160 Mass. 102, 35 N. E. 113.

[2] Crampton *v.* Zabriskie, 101 U. S. 601; Osborn *v.* Bank of United States, 9 Wheat. (U. S.) 738; Board of Liquidation *v.* McComb, 92 U. S. 531.